IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 25TH SEPTEMBER 2007 / 3RD ASWINA 1929

CMA.No. 226 of 2000()

AGAINST THE ORDER DATED 09/10/2000 IN IA. 872 /1997 IN AS.122/1990 of SUB COURT, TIRUR

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APPELLANTS: PETITIONERS/RESPONDOENTS 1, 3, 4, 5, AND 6 THE APPEAL

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1. DEVAKI D/O CHANDANA PARAMBIL KRISHNAN (DIED) 47 YEARS VADAKKUM PURAM AMSOM, DESOM, TIRUR TALUK '

2. PANDAN S/O KRISHNAN VADAKKUMPURAM AMSOM, DESOM, TIRUR TALUK

3. SUBHDRA D/O LATE KRISHNAN VADAKKUMPURAM AMSOM, DESOM, TIRUR TALUK

4. SAVITHRI D/O LATE KRISHNAN VADAKKUMPURAM AMSOM DESOM, TIRUR TALUK

5. VALLI W/O LATE KRISHNAN VADAKKUMPURAM AMSOM, DESOM, TIRUR TALUK

BY ADV. SRI.T.KRISHNAN UNNI

RESPONDENTS:

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1. CHANDANAPARAMBIL NARAYANAN (KUNJUMAKAN) VADAKKUMPURAM AMSOM, DESOM, TIRUR TALUK

2. GOPALAN S/O CHANDANAPARAMBIL NARAYANAN (KUNJUMAKAN) -DO- - DO-
(DELETED from the PARTY ARRAY AT THE RISK OF APPELLANTS VIDE ORDER DATED 23-8-2007 ON I.A. 3115/2007)

3. MALA W/O NARAYANAN , VADAKKUMPURAM AMSOM, DESOM TIRUR TALUK

4. CHANDANAPARAMBIL KUNHU'S SON PARANGODAN VADAKKUMPURAM AMSOM, DESOM, TIRUR TALUK

5. PARAMESWARAN S/O KRISHNAN VADAKKUMPURAM AMSOM, DESOM, TIRUR TALUK

6. KUNDU S/O SANKARAN, CHANDANAPARAMBIL -DO- -DO-

7. BALAN S/O -DO- -DO- , VADAKKUMPURAM AMSOM DESOM, TIRUR TALUK.

8. CHINNU, W/O AYYAPPAN , CHETTUPPARA VEEDU, VENGAD AMSOM, DESOM TIRUR TALUK

9. KUNHIMALU W/O KRISHNAN EDAYUR AMSOM, DESOM

10. DEVAKI W/O APPUTTY, EDAYUR AMSOM, DESOM CHEENIYODE.

11. NANIKUTTY W/O VELAYUDHAN PONMOOZHI VEEDU VADAKKUMPURAM AMSOM, DESOM, TIRUR TALUK

12. KARTHIYANI, W/O PANGHAN , KOTTIYIL VEEDU NEDUNGHOTTOOR AMSOM, DESOM, OTTAPPALAM TALUK

BY ADV. SRI.K.RAMACHANDRAN
SRI.K.RAMACHANDRAN

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD ON 25/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

CMA.No. 226 of 2000()

ORDER IN C.M.P NO. 6030 OF 2000 IN C.M.A. NO. 226 OF 2000

DISMISSED

25-7-2000

SD/-
K.PADMANABHAN NAIR, JUDGE

K.PADMANABHAN NAIR, J.

C.M.A No.226 of 2000

Dated this the 25th day of September 2007

JUDGMENT

The Supplemental plaintiffs 2,4,5,6 and 7 in O.S. 90/1984 on the file of the Munsiff court Tirur who were the appellants in A.S 122/1990 are the appellants in this Civil Miscellaneous appeal. The Civil Miscellaneous appeal is filed challenging an order passed by the Lower Appellate Court dismissing an application filed by the appellants to set aside the exparte decree and judgment passed by the lower appellate court allowing the appeal and dismissing the memorandum of cross appeal filed by the appellants. for default.

2. The suit was one for recovery of possession on the strength of the title of the appellants and also for recovery of damages. The suit was decreed in part by the trial court. The prayer for recovery of possession was granted. But the claim for damages was disallowed. The defendants filed appeal against the decree allowing recovery of possession before the Court of the Subordinate Judge of Tirur in A.S 122/1990. The appellants filed a memorandum of Cross objection challenging that part of the decree and judgment disallowing damages.When the appeal and cross appeal came up for hearing the counsel appearing for the appellants (respondents in the appeal) reported no instructions. The lower appellate court allowed the appeal set aside the decree and judgment of the trial

court and dismissed the suit. The memorandum of cross appeal dismissed for default. The C.M. appellants filed a petition to set aside the exparte decree and judgment passed in the appeal and also to set aside the order dismissing the memorandum of cross appeal for default and restore the appeal and cross appeal back to file. The lower appellate court dismissed that application. Challenging that order this C.M. appeal is filed.

3. The counsel appearing for appellants has argued that the reasons stated by the lower appellate court dismissing the application are illegal and unsustainable.

4. Two reasons were stated in the petition to set aside the exparte decree and judgment passed by the lower appellate court. They are (i) The copies of the deposition of the witnesses were not available among the case records and (ii) two letters send by the Advocate clerk were not received by the appellants. The lower appellate court found that the reasons stated were not genuine and dismissed the application. The lower appellate court also held that the cross appeal was dismissed for default only due to the non-diligence of the appellants and that the reasons stated for re-hearing of the appeal are not at all sufficient. Considering the fact that this suit was for recovery of immovable property I am of the view that one more opportunity can be granted to the appellants who are the appellants in A.S. 122/1990 to contest the appeal on merits. But in view of the fact that the prayer is to restore an appeal filed in the year 1990

the prayer can be allowed only on heavy terms. If the appellants are prepared to pay a cost of 3,000/- within two months from today, the order passed by the court below decreeing the appeal and dismissing the cross appeal will stand set aside and the appeal and cross appeal will restored to file. In case the appellants fail to comply with the above condition the order passed by the court below dismissing I.A. 872/1997 will stand confirmed.

5. In the result the Civil Miscellaneous appeal is disposed in the following manner. The exparte judgment and decree passed by thelower appellate court in A.S. 122/ 1990 and the order dismissing the memorandum of cross objection filed by the appellants for default will stand set aside and the appeal and memorandum of cross objection restored back to file on condition that the appellant pays a cost of Rs. 3,000/- to the respondent within two months from today. If the condition is complied with, the lower appellate court shall take A.S. 122/ 1990 and the memorandum of cross objection back to file and dispose of the same afresh in accordance with law. If the condition is not complied with, the order dismissing I.A. 872/1997 will stand confirmed.

K.PADMANABHAN NAIR,JUDGE

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